No. 79-613

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALTON R. MOSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no opinion. The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 604 F.2d 569.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1979 (Pet. 1). The court of appeals denied a petition for rehearing en banc on September

20, 1979. The petition for a writ of certiorari was filed on October 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for aiding and abetting the filing of false withholding tax forms is barred by the First Amendment.

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on five counts of aiding, abetting, counseling or inducing the filing of false withholding tax forms, in violation of 26 U.S.C. 7205. The district court imposed concurrent one-year sentences on each of the five counts. The court of appeals affirmed (Pet. App. 1a-9a).

The evidence adduced at trial may be summarized as follows: On March 8, 1978, petitioner conducted a meeting in Grand Island, Nebraska. At this meeting, petitioner delivered a speech in which he expressed his view that the income tax was unconstitutional and gave instructions as to how individuals could prevent the withholding of taxes from their wages by filing a form W-4 with their employer claiming large numbers of withholding allowances. Donald R. Gronewold, one of the principals later convicted for filing false withholding allowance certificates, attended this meeting and made a tape recording of petitioner's speech (Pet. App. 2a). Al-

though petitioner did not specifically request Gronewold to make the tape, he knew that Gronewold and others were recording his speech and approved of such recording (Tr. 162).

One or two days after the meeting, Gronewold played the tape recording of petitioner's speech for several of his co-workers at Van's Electric Company (Tr. 168). Within a few days, Gronewold and three co-workers filed false W-4 Forms (Tr. 170, 182, 188, 190, 227, 206-207). On April 8, 1978, petitioner visited Van's Electric Company and spoke with three individuals. He advised them that if they had legal problems with respect to the filing of the withholding allowance certificates he would defend them for a stated fee (Pet. App. 2a). While visiting Van's Electric Company, petitioner also spoke directly with the fifth principal, Shawn W. Sanne. He advised Sanne that he should file a Form W-4 claiming that he was exempt from withholding taxes (Tr. 265). Sanne thereafter filed such a form on April 10, 1978. Gronewold, Sanne, and their three co-workers were each convicted of filing a false W-4, in violation of 26 U.S.C. 7205.[1] All five principals testified that they would not have filed the false form in the absence of petitioner's advice (see note 2, *infra*).

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[1] This case therefore does not involve the question presented in *Standefer* v. *United States*, cert. granted, No. 79-383 (January 7, 1980), as to whether a defendant charged with aiding and abetting the commission of an offense may be convicted after the principal has been acquitted.

ARGUMENT

1. The court of appeals correctly upheld petitioner's conviction for aiding and abetting the filing of false withholding tax information.

The federal aiding and abetting statute, 18 U.S.C. 2(a), provides that "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." As this Court has held, a conviction under the statute requires that the accused " 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' " *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), quoting from *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.).

While the defendant need not have a personal stake in the outcome of the criminal enterprise (*United States* v. *Harris*, 441 F.2d 1333 (10th Cir. 1971)), it is necessary that there be more than mere presence or acquiescence in the crime itself. *United States* v. *Kelton*, 446 F.2d 669 (8th Cir. 1971); *Baker* v. *United States*, 395 F.2d 368 (8th Cir. 1968). There must be a "purposive attitude" that facilitates the crime (*United States* v. *Peoni*, *supra*, 100 F.2d at 402), *i.e.*, some affirmative participation that at least encourages the principal. See, *e.g.*, *United States* v. *Thomas*, 469 F.2d 145, 147 (8th Cir. 1972), cert. denied, 410 U.S. 957 (1973); *United States* v. *Wiebold*, 507 F.2d 932, 934 (8th Cir. 1974); *United States* v. *Dickerson*, 508 F.2d 1216 (2d Cir. 1975); *United States* v. *Baumgarten*, 517 F.2d 1020 (8th Cir.), cert. denied, 423 U.S. 878 (1975).

Here, the record establishes that each principal received the information as to how to file the false form solely from the petitioner. Moreover, each principal testified that petitioner's statements were his only inducement to file the false forms.[2] Petitioner individually counselled one of the principals, Sanne, to file a fraudulent Form W-4. Finally, after the other principals filed the false forms, petitioner gave approval to their action and indicated that, for a fee, he would defend them in any ensuing legal action, styling himself a "constitutional lawyer." The court of appeals correctly concluded that there was ample evidence for the jury to conclude that petitioner was an active participant in the fraudulent withholding scheme. Accord: *United States* v. *Buttorff*, 572 F.2d 619 (8th Cir.), cert. denied, 437 U.S. 906 (1978).

Relying upon *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), petitioner argues that his conviction for aid-

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[2] Gronewold testified that petitioner's statements influenced him to file the false form, and instructed him how to do so (Tr. 163-164). He also testified that had he not heard petitioner's speech on tape, he would not have filed the false forms (Tr. 170), and that absent petitioner's instructions, he would have lacked the knowledge as to how to do so (Tr. 182). The other principals who heard the tape testified to the same effect. See testimony of Dennis G. Vanosdall (Tr. 190), Larry D. Spencer (Tr. 206-207, 210), and Robert L. Lillienthal (Tr. 227, 246, 255). The fifth principal, Shawn W. Sanne, did not hear the tape. However, petitioner specifically advised him to file the false form (Tr. 265), and Sanne would not have done so absent petitioner's advice (Tr. 267).

ing and abetting the filing of false withholding tax information is an impermissible violation of his First Amendment right to freedom of speech and expression. In *Brandenburg*, a unanimous Court struck down an Ohio statute that made criminal the advocacy of violence to achieve political reforms. The Court held that advocacy of violence or the joining with others to do so could not be proscribed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (395 U.S. at 447). Accord: *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973).

But in pointing out that the facts in this case are similar to those involved in its prior decision in *United States* v. *Buttorff*, *supra* (Pet. App. 4a-5a), the court of appeals recognized that petitioner's conduct went well beyond mere general advocacy of resistance to the internal revenue laws that might be protected by the First Amendment. While petitioner did not engage in "preparing a group for violent action and steeling it to such action" (*Noto* v. *United States*, 367 U.S. 290, 297-298 (1961)), he nevertheless advocated a specific course of lawless conduct by explaining how to avoid withholding taxes, under circumstances in which it was reasonably predictable that his counsel would imminently induce some of those whom he addressed to commit the offense of filing false withholding tax information. Unlike the state criminal syndicalism statute at issue in *Brandenburg*, which by its own terms and as applied punished mere advocacy and assembly with others, the decisions under

the federal aiding and abetting statute require that the defendant engage in some affirmative participation that encourages the commission of a substantive crime. The fact that petitioner's affirmative participation in and encouragement of the principals' criminal conduct took the form of speech does not entitle it to First Amendment protection where that speech communicated a blueprint for the commission of a crime and in fact induced the commission of that crime. See, *e.g.*, *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969); *Gara* v. *United States*, 178 F.2d 38, 41 (6th Cir. 1949); *Warren* v. *United States*, 177 F.2d 596 (10th Cir. 1949).

2. Petitioner also argues (Pet. 10-11) that the district court should have acceded to the jury's request for reinstruction rather than simply referring to its original instructions (Tr. 628). But petitioner did not raise this issue in the court of appeals, and, absent exceptional circumstances not present here, this Court should not review this contention. See *United States* v. *Lovasco*, 431 U.S. 783, 788, n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

At all events, the decision whether to reinstruct the jury is within the discretion of the trial court. See, *e.g.*, *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *United States* v. *Toney*, 440 F.2d 590 (6th Cir. 1971); *Wilson* v. *United States*, 422 F.2d 1303 (9th Cir. 1970); *Batsell* v. *United States*, 403 F.2d 395 (8th Cir. 1968), cert. denied, 393 U.S. 1094 (1969); *Whitlock* v. *United States*, 429 F.2d 942 (10th Cir. 1970). Here, the jury requested fur-

ther instructions as to whether certain of petitioner's statements, suggesting that his listeners make their own legal decisions, would be sufficient to negate a finding of guilt if the acts actually occurred. But the district court had fully and correctly instructed the jury on all elements of the crime, including intent, willfulness and the law of aiding and abetting (Tr. 615-618). Accordingly, the trial court did not abuse its discretion in refusing to reinstruct the jury and in referring them instead to its original instructions.

3. Petitioner further contends (Pet. 12-14) that he was entitled under the Fifth Amendment to be prosecuted by indictment, rather than by information, as was the case here. Here, the crime with which petitioner was charged and convicted—aiding and abetting violations of Section 7205 of the Internal Revenue Code—was a misdemeanor. Since it is well settled under the decisions of this Court that a misdemeanor is not an "infamous" crime requiring indictment under the Constitution (*Duke* v. *United States*, 301 U.S. 492 (1937); see *United States* v. *Moreland*, 258 U.S. 433 (1922); *Ex parte Wilson*, 114 U.S. 417 (1885)), the government properly proceeded by information.

4. Petitioner also complains (Pet. 15) that the government used duress to gain testimony from its witnesses. Apart from his failure to raise this issue in the court of appeals, petitioner points to no evidence in the record to support his contention.

5. Finally, contrary to petitioner's argument (Pet. 15-16), the decision below correctly ruled (Pet. App. 4a n.4) that he had not raised the issue of multiplicity of charges in the court of appeals. In any event, the information did not charge a single offense in multiple counts. See *Gerberding* v. *United States*, 471 F.2d 55, 58 (8th Cir. 1973). Petitioner was prosecuted for aiding and abetting the submission of five separate false withholding allowance certificates by five separate individuals on several different occasions. At all events, petitioner suffered no harm from the alleged multiple charges because the district court imposed concurrent sentences on each of the five counts. *Benton* v. *Maryland*, 395 U.S. 784 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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